SUPREME COURT, U. S.

FILED

OCT 17 1974

MICHAEL RODAK, JR., C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-292

EMPIRE FIRE AND MARINE INSURANCE COMPANY, *et al.*,
*Petitioners,*

*v.*

DIETRICH MEYERHOFER, *et al.*,
*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION

ROGERS M. DOERING
One Battery Park Plaza
New York, New York 10004
*Counsel for Respondents Meyerhofer, Federman and the Bernson firm*

*Of Counsel:*
CYNTHIA M. COHEN
SIMPSON THACHER & BARTLETT

## INDEX


| | PAGE |
|---|---|
| Questions Presented | 2 |
| Proceedings Below | 2 |
| Reasons for Denying the Writ | 4 |
| Counterstatement of Facts | 4 |
| Argument | |
| I. Whether, on the facts of this case, the Bernson firm was permitted to receive Goldberg's proffered proof of his innocence is not a question which merits review | |
| A. The case was correctly decided in accordance with accepted law | 11 |
| B. There is no conflict with other decisions | 16 |
| II. Whether Meyerhofer and Federman should have been enjoined or disqualified from acting as class representatives in the present case is not a question which merits review | 17 |
| Conclusion | 18 |
| Statutory Appendix | A-1 |

## TABLE OF AUTHORITIES

PAGE

***Cases:***

*Clark* v. *United States*, 289 U.S.1 (1933) .....14, 15, 17

*Coveney* v. *Tannahill*, 1 Hill 33 (N.Y. Sup. Ct. 1841).... 15

*Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973) ..... 16

*Securities and Exchange Commission* v. *Sitomer, Sitomer & Porges, et al.*, 73 Civ. 4508 (S.D.N.Y. October 19, 1973) ..... 10

***Statutes and Rules:***

Securities Act of 1933 §5, 15 U.S.C. §77e (1970)..1, A-1—A-2

Securities Act of 1933 §10, 15 U.S.C. §77i (1970)..1, A-2—A-4

Securities Act of 1933 §17, 15 U.S.C. §77q (1970) 1, A-4—A-5

Securities Act of 1933 §24, 15 U.S.C. §77x (1970) ..... 1, A-5

Instructions for Form S-1, Item 1 .....5, A-6—A-7

Instructions for Form S-1, Item 3 .....5, A-7—A-8

Instructions for Form S-1, Item 23 ..... 5, A-8

***Miscellaneous:***

Canons of Professional Ethics, Canon 37 .....

Code of Professional Responsibility, DR 4-101(C)(4).. 12

Code of Professional Responsibility, DR 7-102(A)(1).. 13

Code of Professional Responsibility, EC 7-10 ..... 13

Opinion No. 155 of the American Bar Association's Committee on Professional Ethics (1936) ..... 14

Opinion No. 250 of the American Bar Association's Committee on Professional Ethics (1943) ..... 12

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1974**

No. 74-292

EMPIRE FIRE AND MARINE INSURANCE COMPANY, *et al.*,
*Petitioners,*

*against*

DIETRICH MEYERHOFER, *et al.*,
*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION

Dietrich Meyerhofer ("Meyerhofer"), Herbert Federman ("Federman") and Bernson, Hoeniger, Freitag & Abbey (the "Bernson firm") submit this memorandum in opposition to the petition filed by Empire Fire and Marine Insurance Company ("Empire"), Gary O. Gross, Yale J. Kaplan, Robert A. Phillips Francis J. Kratky, Nick Lalich, L. C. Swick and M. M. Jennings, Jr. (collectively referred to as the "Empire petitioners") for review of a decision by the Court of Appeals for the Second Circuit in regard to certain events involving the Bernson firm, Empire, Sitomer, Sitomer & Porges (the "Sitomer firm") and Stuart Charles Goldberg ("Goldberg"). This case arises under the Securities Act of 1933 (15 U.S.C. §§77e, 77i, 77q and 77x (1970)) (the "Act") and involves several provisions of the American Bar Association Code of Professional Responsibility (the "Code").[1]

1. The pertinent provisions of the Act are set forth in the appendix to this brief. The pertinent provisions of the Code are set forth in Appendix G to the Petition.

## Questions Presented

1. Whether, on the facts of this case, the Bernson firm was not only entitled, but ethically obligated, to receive Goldberg's proffered proof of his innocence of the fraud of which he was accused?

2. Whether, on the facts of this case, Meyerhofer and Federman should have been disqualified from prosecuting any action against Empire and the Sitomer firm relating to the non-disclosure in the Empire registration statement of the finder's fee received by the Sitomer firm from Empire?

## Proceedings Below

This case was brought as a class action by Meyerhofer and Federman, shareholders of Empire (17a)[2], alleging that Empire's registration statement, in reliance on which they had purchased their Empire stock, had failed to disclose a finder's fee received by the Sitomer firm from Empire. The complaint named as defendants Empire, the principal underwriter (Faulkner), the Empire petitioners (directors and officers of Empire and themselves selling shareholders), the Sitomer firm and those, who according to the best information possessed by the Bernson firm (counsel to Meyerhofer and Federman), were partners of the Sitomer firm. Included in this last group was Goldberg (7a).

On a motion by Empire, the Empire petitioners and the Sitomer firm, the District Court entered an order (a) dismissing the action without prejudice, (b) enjoining and disqualifying the Bernson firm from acting as attorneys or participating in any way with attorneys for Meyerhofer and

2. References indicated by a number and the letter "a" are to the Appendix filed in the Second Circuit.

Federman in this action or in any future action against Empire involving the same transactions, occurrences, events, allegations, facts or issues, (c) granting the same relief against Goldberg (who had never assumed to act for plaintiffs) and (d) enjoining the Bernson firm and Goldberg from disclosing confidential information regarding Empire to others (206-220a).

On appeal by Meyerhofer, Federman, the Bernson firm and Goldberg, the Court of Appeals for the Second Circuit, through a panel of experienced senior judges, in an opinion by Judge Leonard Moore, unanimously reversed the order of the District Court with respect to Meyerhofer, Federman and the Bernson firm and dismissed the cross-appeals of Empire, the Empire petitioners and the Sitomer firm (which had sought to enjoin Meyerhofer and Federman from disclosing any confidential information about Empire and to disqualify them from prosecuting as class representatives any action against Empire and the Sitomer firm relating to the non-disclosure in the Empire registration statement of the finder's fee received by the Sitomer firm from Empire) (Petition Appendix B).[3] The injunction against Goldberg was affirmed. The panel also unanimously denied petitioners' application for rehearing (Petition Appendix E). Since no active judge or member of the panel requested that a vote be taken on petitioners' application for rehearing in banc, that application was denied (Petition Appendix F).

3. References indicated as "Petition Appendix" are to the appendix filed in this Court as part of the Petition for a Writ of Certiorari.

## Reasons for Denying the Writ

This case does not present any broad or generally applicable rule of law. It involves the right of an attorney (Goldberg) deceived by a client into participating in a fraud, to defend himself against the accusations of the persons defrauded. The facts are bizarre; it is safe to say they are not likely to recur with any frequency. Despite what the court below called petitioners' "salvo of innuendo" (Petition Appendix B at 2a) to the contrary, both courts below were satisfied that at all times both Goldberg and the Bernson firm acted in complete good faith (216a), and that at no time did Goldberg do anything more than was reasonably necessary in his own defense (Petition Appendix B at 18-19a).

The decision of the Second Circuit is not even claimed to be in conflict with any decision of this Court or of any other Circuit. Petitoners argue only that the decision is in conflict with other decisions of the Second Circuit. This is not a sufficient ground for review by this Court. Moreover, the claimed conflict was called to the attention of the court below and rejected, and petitioners' claim was so clearly erroneous that no active judge of the Circuit was prepared to recommend that the case be reheard in banc.

## Counterstatement of Facts

Petitioners' statement of the facts omits so many facts relevant to the decision below and the propriety of review by this Court that the following counterstatement of the facts is necessary.

On May 31, 1972, Empire and its principals made an $8,000,000 offering of Empire common stock to the public (115a). The offering was registered with the Securities and Exchange Commission ("SEC") on its Form S-1 (112a). The registration statement omitted to disclose, as was the fact, that in addition to generous legal fees Empire had agreed to pay a finder's fee equal to approximately

$409,000 (of which $200,000 was cash and $209,000 was in the form of "bargain stock") to its lawyers, the Sitomer firm (19-24a; 120-122a). The existence of this finder's fee arrangement was required to be disclosed under the rules of the SEC (68-73a; 75a). Indeed, the disclosure requirement is so prominently highlighted in the SEC instructions for preparing the Form S-1 that the willfulness of Empire's failure is a foregone conclusion.[4] Moreover, by its own statement, the Sitomer firm specialized in SEC matters (143a). They must have been fully aware that it was specifically required that their finder's fee arrangement be disclosed on the cover page of the Prospectus.[5]

Goldberg is a lawyer (Goldberg SEC Affidavit,[6] ¶¶ 4, 5, 8). From November 15, 1971 to January 21, 1973, he was, at least nominally, a "limited partner" in the Sitomer firm (Goldberg SEC Affidavit, ¶¶ 9-12, and Exhibit 1 thereto). However, far from acting as Empire's counsel in the preparation of the Empire registration statement, Goldberg was, in fact, one of the principal victims of the fraud of non-disclosure. One of the first things he was encouraged to research when he joined the Sitomer firm was whether the large size of the fee (represented to him falsely as being only $200,000) ran afoul of any of the SEC's regulations. When he reported that he was concerned that its size might lead to an inference that it was at least in part intended as

4. The pertinent provisions of the SEC instructions are set forth in the appendix to this brief.

5. Of course, the failure to disclose Empire's agreement to pay a $200,000 cash finder's fee to the Sitomer firm, in addition to $95,000 in legal fees, also rendered the "Use of Proceeds", "Certain Transactions" and "Legal Opinions" sections of the Prospectus false and misleading, as well as a latest balance sheet therein, which did not reflect this $200,000 contingent liability. Further, the Prospectus failed to disclose that the Sitomer firm was acting as a finder, and that its purchase of Empire's stock for $209,000 less than its value at the issue price was part of the total finder's fee of $409,000. (See Instructions for Form S-1, Items 1, 3 and 23.)

6. All of the Goldberg Affidavits were filed in the Court of Appeals.

a finder's fee, he was encouraged to examine that question (Sealed Goldberg Affidavit of June 21, 1973, ¶ 13). Although the compensation agreement (114a) inescapably demonstrates that the compensation was exclusively intended as a finder's fee, Goldberg was never shown or told about the agreement. Instead, he was refused access to it on the ground that he was *only a limited partner. Moreover, the* contingent nature of the fee was carefully withheld from him. In this way he was encouraged to research a total irrelevance and permitted to come to an entirely wrong conclusion precisely so that he would not understand that the Sitomer firm and Empire were engaged in a knowing violation of law (Sealed Goldberg Affidavit of June 21, 1973, ¶ 13). The reason for this farce is suggested by Stephan Sitomer's affidavit of June 15, 1973, where he blandly suggests that he innocently relied on Goldberg in deciding not to consult the SEC as to whether disclosure of the finder's fee arrangement was necessary (148a). Finally, when Goldberg began to suspect the truth, the Sitomer firm persistently evaded his questions.

On January 20, 1973, Goldberg finally discovered the facts (Goldberg SEC Affidavit, ¶¶ 35, 55, 65-67)[7] and advised the Sitomer firm that they and their client should disclose the omission to the SEC (Goldberg SEC Affidavit, ¶¶ 70-73, 75-76). The Sitomer firm responded to Goldberg's advice replying—not that Goldberg was wrong—but that they

---

7. The context in which this was disclosed to Goldberg is important. The whole matter came to light after Sullivan & Cromwell had discovered in another matter that the same fraud was being perpetrated on it and its underwriter client, had insisted that the Sitomer firm immediately withdraw, and had announced its intention to make prompt full disclosure to the SEC. In attempting to fabricate a cover story the two Sitomers and Porges, for the first time, reluctantly revealed to Goldberg the existence of a parallel agreement with Empire (Goldberg SEC Affidavit, ¶¶ 35-67).

would take their chances on the SEC's never finding out (Goldberg SEC Affidavit, ¶¶ 71-73). Thereupon, Goldberg resigned from the firm and laid the facts before the SEC (Goldberg SEC Affidavit, ¶¶ 76-77, 82).

On April 12, 1973, Empire filed its 10-K which again misrepresented the true state of affairs by stating that the Empire registration statement had failed to disclose a commitment for a $200,000 payment to the Sitomer firm, as well as certain other features of the compensation arrangement between Empire and the Sitomer firm (Empire 10-K, filed April 12, 1973, and quoted in Original Complaint at 12a). A proxy statement and annual report disseminated later the same month made similar claims (121a). Neither the 10-K, nor the proxy statement nor the annual report made mention that the $200,000 payment constituted a finder's fee. Nor was there any revelation that the Sitomer firm's finder's fee in fact amounted, not to $200,000, but to $409,000.

Untruthful though these statements were, they did constitute sufficient notice to Meyerhofer and Federman that they had grounds for consulting an attorney. Accordingly, they consulted the Bernson firm and brought suit, naming as defendants Empire, the principal underwriter, the directors and officers of Empire who signed the registration statement and were themselves selling shareholders in the Empire offering, and the Sitomer firm and its partners (7a). The complaint (with remarkable prescience) accused all defendants except the underwriter of having acted in "agreement, concert, understanding and conspiracy" (23a) with the purpose and intent

> "to conceal both the compensation arrangements (including the $200,000) between Empire and the Sitomer firm, and, upon information and belief, the fact that the Sitomer firm was acting not only as counsel for the issuer and the selling stockholders, but also in some other undisclosed capacity, e.g. that of a finder." (Original Complaint, ¶17 at 23-24a.)

When the Bernson firm attempted to serve process upon Goldberg, they set in motion the bizarre chain of events which resulted in the order of disqualification which was the subject of the decision below. Service was effected on the Sitomer firm on May 2, 1973 (6a). Alvin Sitomer, who accepted service for the Sitomer firm, himself, Stephan Sitomer and Robert Porges, informed the process server that Goldberg was no longer with the firm and that service could not be accepted for him (110-111a). The Bernson firm found Goldberg in the phone book and called him up to arrange for service of process (89-90a). Upon being apprised of the nature of the complaint, Goldberg asked for an opportunity to demonstrate to the Bernson firm that he had been unaware of the finder's fee arrangement which, he said, Empire and the Sitomer firm had concealed from him as well as from the public (90-91a; 101a; Sealed Goldberg Affidavit of June 21, 1973, ¶¶11-12). Goldberg agreed to accept service in the event the Bernson firm was not convinced of his noninvolvement (104-106a). The Bernson firm promised him an opportunity to be heard (91-92a).

In keeping with their promise, the Bernson firm did talk to Goldberg on at least two occasions (91-95a). The story Goldberg told was the one recited above and which revealed that Goldberg himself had been the victim of a fraud such that no genuine attorney-client relationship had ever arisen between him and Empire as to the matter in issue here (Goldberg SEC Affidavit; Sealed Goldberg Affidavit of June 21, 1973). As proof of the truth of the facts he recited, Goldberg asked the Bernson firm to consider an affidavit which he had given to the SEC at the time of his original disclosure (91-92a). After consulting with enforcement attorneys at the SEC and ascertaining that they had no objection to compliance with Goldberg's request, the Bernson firm read Goldberg's affidavit and found that it fully

supported his protestations of innocence (93-95a). The fact that the affidavit had been prepared prior to the commencement of the action against Goldberg indicated that the matters recited in the affidavit were not created for the purpose of extricating Goldberg from the action in which he found himself a defendant and was thus added proof of his veracity.[8] Accepting this (and other) proof of his innocence, the Bernson firm made a motion in the District Court to drop Goldberg as a defendant on the ground that they did not believe they had any case against him (27-36a). They made full disclosure of the facts to the District Court, and they advised Goldberg that he might still find himself involved in the litigation as a third-party defendant (34-35a; 58-59a; 95a).

At the time of the operative events set forth above, there was thus ample reason for the Bernson firm to believe that both Goldberg and the public had been victims of a fraud. Nothing that has transpired since has indicated that this conclusion was in any way mistaken. The SEC after an investigation—in which, incidentally, both Empire and the Sitomers testified without making any claim of privilege[9]—filed a complaint charging Empire, its two principal officers (one of whom is its house counsel) and the three general partners of the Sitomer firm with commission of the same fraud which formed the predicate for the complaint herein.

---

8. The Bernson firm already had evidence which corroborated Goldberg's claim of innocence. They had been informed by other attorneys that Goldberg was a thoroughly reputable lawyer and that his claim of innocence was based on fact. (*See* discussion *infra* at 13.)

9. Affidavit of William P. Sullivan, dated November 20, 1973, in support of a motion in the Second Circuit by the SEC for leave to receive service of briefs, etc., ¶¶ 3-5.

The SEC complaint[10] revealed (as the evidentiary hearing requested by Goldberg, Meyerhofer and Federman herein would have revealed had it been held[11]) that the Empire-Sitomer scheme to obtain undisclosed finder's fees was only one of twenty similar frauds by the Sitomer firm (SEC Complaint, ¶ 27) and that Empire and the Sitomer firm intentionally concealed the finder's fee by arbitrarily allocating a substantial portion of such fee to services other than those of a finder, by back-dating certain transactions, by preparing subsequent bills to justify payments already received, by causing a false confirmation to be made by Empire's auditors, Arthur Andersen & Co., and by committing perjury before the SEC (SEC Complaint, ¶¶ 17, 18(b), 19(a) and 19(b)).

Messrs. Rogers & Wells, attorneys for Faulkner (the principal underwriter) in this action, similarly represented to the Bernson firm that Faulkner, like Goldberg, had itself been defrauded by Empire and the Sitomer firm and was thus innocent of any wrongdoing or negligence. The Bernson firm agreed that if Faulkner's lack of culpability could be established, they would consent to a dismissal of the action with prejudice as against Faulkner. Lacking any evidence of Faulkner's conduct other than the representations made by Messrs. Rogers & Wells after the service of the complaint, the Bernson firm took depositions and obtained documents from Faulkner and from Jacobs, Persinger & Parker, who had acted as Faulkner's counsel in connection with the Empire registration (4a). At this time, incidentally, Messrs. Rogers & Wells gave the Bernson firm a copy of the written compensation agreement

10. *Securities and Exchange Commission* v. *Sitomer, Sitomer & Porges, et al.*, 73 Civ. 4508, (S.D.N.Y. October 19, 1973).

11. Meyerhofer, Federman and Goldberg all requested and were denied an evidentiary hearing in the District Court.

between Empire and the Sitomer firm which neither they nor Goldberg had previously seen (113-114a) and which was conclusive proof of the Empire-Sitomer finder's fee fraud. At the conclusion of discovery, Faulkner moved to dismiss the action with prejudice as against it, and the Bernson firm, now possessing the evidence of Faulkner's innocence, consented thereto (4a).

## POINT I

**Whether, on the facts of this case, the Bernson firm was permitted to receive Goldberg's proffered proof of his innocence is not a question which merits review.**

### A. The case was correctly decided in accordance with accepted law.

The court below held simply that under the circumstances set forth above Goldberg had the right to make an appropriate disclosure with respect to his role in Empire's public offering and that he had the right to support his version of the facts with suitable evidence (Petition Appendix B at 19a). Goldberg was charged with knowingly participating in the filing of a false and misleading registration statement. The complaint herein alleged violation of criminal statutes and civil liability for damages computable at over $4,000,000 (Petition Appendix B at 19a). Goldberg was an attorney who had specialized in securities law and had published various books and treatises on that and related subjects. The court below found that the mere pendency of such charges against Goldberg sufficiently endangered his professional reputation as to be cause for great concern on his part (Petition Appendix B at 19a). Additionally, the court found that the monetary cost of simply defending an action like the one herein might

be very substantial. The court therefore held that these circumstances amounted to an "accusation of wrongful conduct" which permitted Goldberg to defend himself as effectively as he knew how and in the manner chosen in this case, even if in so doing he revealed information which the perpetrators of the fraud would rather were not revealed.

This right is expressly recognized in DR 4-101(C)(4) of the Code, which permits an attorney to disclose, without his client's consent,

> "Confidences or secrets necessary to . . . defend himself . . . against an accusation of wrongful conduct."

There is no requirement in the Code that the accusation of wrongful conduct come directly from the client. Indeed, DR 4-101(C)(4) is in direct contrast to former Canon 37, its predecessor, which granted the attorney a more limited right of self-defense by providing:

> "If a lawyer is accused *by his client*, he is not precluded from disclosing the truth in respect to the accusation." (Petition Appendix G at 34a) (emphasis added).[12]

Since Goldberg's conduct was in accord with his ethical obligations under the Code, it followed, the court correctly held, that the receipt by the Bernson firm of the proffered evidence was also not in violation of the Code.

The Second Circuit's reversal of the disqualification order is supported not only by Goldberg's right of self-defense but by the direct ethical obligations of the Bernson firm itself. No lawyer lightly accuses another of conduct

---

12. In fact, former Canon 37 itself may have permitted the specific disclosures made by Goldberg. *See* Opinion No. 250 of the American Bar Association's Committee on Professional Ethics (1943).

amounting to a crime, and certainly there is no excuse for persisting in such an accusation after it has been demonstrated to be groundless. Canon 7 of the Code states the lawyer's obligation in this regard as follows:

> "The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." EC 7-10.[13]

At the time that Goldberg offered his SEC affidavit as proof of his innocence, the Bernson firm had been advised by Goldberg that he was innocent (90-91a; 101a), discovered that Goldberg's career had been devoted to securities law enforcement and that he was well known as an authority in the area (91-92a), been informed by partners of Pomerantz, Levy, Haudek & Block that Goldberg was a thoroughly reputable lawyer whom they had counselled to reveal the facts showing his innocence to the Bernson firm (92-93a), been informed by Burton H. Finkelstein of Messrs. Phillips, Nizer, Benjamin, Krim and Ballon to the same effect, and been informed by William P. Sullivan (Special Counsel at the SEC) that Goldberg's claim of innocence was to the best of Sullivan's knowledge based on fact (93-94a; 105a). In the face of this evidence generally corroborative of Goldberg's statements of innocence, the Bernson firm was not only entitled but, under EC 7-10 and DR 7-102(A)(1), expressly obligated, to examine the documentary evidence which Goldberg proffered as establishing his innocence.

---

13. See also DR 7-102(A)(1) which states that in his representation of a client a lawyer shall not

> "File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Moreover, the Bernson firm had every reason to believe that Goldberg was entitled to show them the disputed affidavit even in the absence of any right of self-defense. While there is no doubt that a lawyer is required to preserve the confidences and secrets of a client, that duty is subject to well-recognized qualifications which are called into play here because, simply stated, the conduct of Empire and the Sitomer firm constituted a crime under the Act, a continuing wrong[14] to Meyerhofer and Federman and those they represented, and a fraud on Goldberg himself. This Court's formulation of the applicable rule cannot be improved:

> "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." *Clark* v. *United States*, 289 U.S. 1, 15 (1933).

Opinion No. 155 of the American Bar Association's Committee on Professional Ethics (1936) states the rule in a slightly more detailed fashion:

> "When the communication by the client to his attorney is in respect to the future commission of an unlawful act or to a continuing wrong, the communication is not privileged. One who is actually engaged in committing a wrong can have no privileged witnesses, and public policy forbids that an attorney should assist in the commission thereof, or permit the relation of attorney and client to conceal the wrongdoing."

Moreover, the duty of confidentiality, even as qualified above, never arises unless there is an attorney-client rela-

14. The 10-K filed by Empire made reference to the compensation arrangements with the Sitomer firm but still failed to disclose that they involved a finder's fee. Since Empire was in the process of continuing to file reports with the SEC, which reports still did not disclose that the compensation arrangement was a finder's fee, Empire was engaged in the commission of a continuing wrong.

tionship. Where the client deceives the attorney in relation to the subject matter of their association, as Empire did here, the attorney-client relationship never arises. As this Court said in an analogous situation:

> "[T]he privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. . . . The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror [whom Mr. Justice Cardozo analogized to the client in the attorney-client relationship] may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrongdoing will avail without more to put the privilege to flight. There must be a showing of a *prima facie* case sufficient to satisfy the judge that the light should be let in." *Clark* v. *United States,* 289 U.S. 1, 14 (1933) (Cardozo, J.).

So too in *Coveney* v. *Tannahill,* 1 Hill 33 (N.Y. Sup. Ct. 1841), Judge Bronson said:

> "Indeed, I think there can be no such *relation* of attorney and client, either in the commission of a crime, or the doing of a wrong by force or fraud to an individual. The privileged relation of attorney and client can only exist for lawful and honest purposes." *Id.* at 35 (emphasis added).

And, Judge Seabury told the American Law Institute many years ago:

> "In truth, in such cases, it is neither a legal nor professional relationship." New York Herald Tribune, May 8, 1932.

The facts as the Bernson firm knew them at the time Goldberg offered evidence of his innocence, the disclosures

revealed to them and to the court in Goldberg's SEC Affidavit and all the subsequent revelations which have followed, demonstrate that Goldberg was deliberately deceived both by Empire and the Sitomer firm and made to become an unwitting, though minor, part of their fraudulent scheme. The position taken by Empire in its petition, that the defrauded Goldberg owed them a duty of loyalty and that his lips were sealed from disclosing the truth about the fraud, is completely untenable. No such distortion of ethical standards would be tolerable. The public interest in the disclosure of wrongdoing and its elimination, where confidentiality cannot properly be claimed, should not be lightly swept aside.

**B. There is no conflict with other decisions.**

There is no conflict with decisions of this Court or among the Circuits. Indeed, although it would be of no moment, there is in fact no conflict in the Second Circuit. Petitioners argue that the court below incorrectly failed to apply the strict prophylactic rule set forth in its earlier decision of *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973), and that application of such rule would have required disqualification of the Bernson firm because of an appearance of impropriety. *Emle* involved the propriety of an attorney's bringing suit against a former client, the subject matter of which bore a substantial relationship to the matters involved in the attorney's representation of his former client. *Id.* at 570. These facts bear no relation to the present situation. It is, of course, true that a lawyer should not earn a living suing former clients, setting himself up as a judge of what intimate piece of information

he may or may not use to his benefit and his former client's detriment. A turncoat has few equities. The faithless party to this relationship, however, was not the attorney but the client, whose fraud on Goldberg had placed Goldberg's entire career in jeopardy. The court below properly considered the totally different factual context. Indeed, quoting, once again, from Justice Cardozo:

> "[T]he recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them . . . ." *Clark* v. *United States*, 289 U.S. 1, 13 (1933).

## POINT II

**Whether Meyerhofer and Federman should have been enjoined or disqualified from acting as class representatives in the present case is not a question which merits review.**

The court below dismissed the cross-appeals of petitioners and the Sitomer firm on the ground that since there was no warrant for the disqualification of the Bernson firm there was, *a fortiori*, no sound basis for disqualifying Meyerhofer and Federman (Petition Appendix B at 21a). This result was correct in the circumstances of this case. Indeed, the disqualification of Meyerhofer and Federman themselves, as distinguished from the disqualification of the Bernson firm, was never sought in the District Court in connection with the order appealed from. Had such relief been sought, Meyerhofer and Federman could have shown,

by affidavit and by offer of proof upon an evidentiary hearing, that neither the Goldberg SEC Affidavit nor its contents were disclosed to them. There is no record support for the relief requested. The cross-appellants offer only supposition as to what might have happened and this supposition was rejected by the court below and offers no basis for review by this Court.

## CONCLUSION

**The decision below was correct and is consistent with the decisions of this Court, the decisions of the Courts of Appeals and with the Code of Professional Responsibility. There is no conflict between this case and decisions of this Court or other Circuits or even of the Second Circuit itself. The case depended upon its particular and unusual facts. The petition should be denied.**

Respectfully submitted,

ROGERS M. DOERING
*Counsel for Respondents*
*Meyerhofer, Federman and*
*the Berwson firm*
One Battery Park Plaza
New York, New York 10004

*Of Counsel:*

CYNTHIA M. COHEN
SIMPSON THACHER & BARTLETT

# APPENDIX

## Securities Act of 1933

PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS

SECTION 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10.

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce

or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

INFORMATION REQUIRED IN PROSPECTUS

Section 10. (a) Except to the extent otherwise permitted or required pursuant to this subsection or subsections (c), (d), or (e)—

(1) a prospectus relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of schedule A;

(2) a prospectus relating to a security issued by a foreign government or political subdivision thereof shall contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of schedule B;

(3) notwithstanding the provisions of paragraphs (1) and (2) of this subsection (a) when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense;

(4) there may be omitted from any prospectus any of the information required under this subsection (a) which the Commission may by rules or regulations designate as not being necessary or appropriate in the public interest or for the protection of investors.

(b) In addition to the prospectus permitted or required in subsection (a), the Commission shall by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors permit the use of a prospectus for the purposes of subsection (b)(1) of section 5 which omits in part or summarizes information in the prospectus specified in subsection (a). A prospectus permitted under this subsection shall, except to the extent the Commission by rules or regulations deemed necessary or appropriate in the public interest or for the protection of investors otherwise provides, be filed as part of the registration statement but shall not be deemed a part of such registration statement for the purposes of section 11. The Commission may at any time issue an order preventing or suspending the use of a prospectus permitted under this subsection (b), if it has reason to believe that such prospectus has not been filed (if required to be filed as part of the registration statement) or includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein, in the light of the circumstances under which such prospectus is or is to be used, not misleading. Upon issuance of an order under this subsection, the Commission shall give notice of the issuance of such order and opportunity for hearing by personal service or the sending of confirmed telegraphic notice. The Commission shall vacate or modify the order at any time for good cause or if such prospectus has been filed or amended in accordance with such order.

(c) Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(d) In the exercise of its powers under subsections (a), (b), or (c), the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use or the nature of the security, issue, issuer, or otherwise, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate and consistent with the public interest and the protection of investors.

(e) The statements or information required to be included in a prospectus by or under authority of subsections (a), (b), (c), or (d), when written, shall be placed in a conspicuous part of the prospectus and, except as otherwise permitted by rules or regulations, in type as large as that used generally in the body of the prospectus.

(f) In any case where a prospectus consists of a radio or television broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing with it of forms and prospectuses used in connection with the offer or sale of securities registered under this title.

FRAUDULENT INTERSTATE TRANSACTIONS

Section 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

PENALTIES

Section 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

INSTRUCTIONS FOR FORM S-1.

# Form S-1

## REGISTRATION STATEMENT

**Under The Securities Act of 1933**

## PART I.

## INFORMATION REQUIRED IN PROSPECTUS

**Item 1. Distribution Spread.**

The information called for by the following table shall be given, in substantially the tabular form indicated, on the outside front cover page of the prospectus as to all securities being registered which are to be offered for cash (estimate, if necessary).

| | Price to public | Underwriting discounts and commissions | Proceeds to registrant or other persons |
|---|---|---|---|
| Per Unit ..... | | | |
| Total ..... | | | |

*Instructions*

1. The term "commissions" has the meaning given in paragraph (17) of Schedule A of the Act. Only commissions paid by the registrant or selling security holders in cash are to be included in the table. Commissions paid by other persons, and other considerations to the underwriters, shall be set forth following the table with a reference thereto in the second column of the table. Any finder's fees or similar payments shall be appropriately disclosed.

2. If it is impracticable to state the price to the public, the method by which it is to be determined shall be explained. In addition, if the securities are

to be offered at the market, or if the offering price is to be determined by a formula related to market prices, indicate the market involved and the market price as of the latest practicable date.

3. If any of the securities being registered are to be offered for the account of security holders, refer on the first page of the prospectus to the information called for by Instruction 3 to Item 19.

**Item 3. Use of Proceeds to Registrant.**

State the principal purposes for which the net proceeds to the registrant from the securities to be offered are intended to be used, and the approximate amount intended to be used for each such purpose.

*Instructions*

1. Details of proposed expenditures are not to be given; for example, there need be furnished only a brief outline of any program of construction or addition of equipment. If any substantial portion of the proceeds has not been allocated for particular purposes, a statement to that effect shall be made together with a statement of the amount of proceeds not so allocated.

2. Include a statement as to the use of the actual proceeds if they are not sufficient to accomplish the purposes set forth and the order of priority in which they will be applied. However, such statement need not be made if the underwriting arrangements are such that, if any securities are sold to the public, it can be reasonably expected that the actual proceeds of the issue will not be substantially less than the estimated aggregate proceeds to the registrant as shown under Item 1.

3. If any material amounts of other funds are to be used in conjunction with the proceeds, state the

amounts and sources of such other funds. If any material part of the proceeds is to be used to discharge a loan, the item is to be answered as to the use of the proceeds of the loan if the loan was made within one year; otherwise, it will suffice to state that the proceeds are to be used to discharge the indebtedness created by the loan.

4. If any material amount of the proceeds is to be used to acquire assets, otherwise than in the ordinary course of business, briefly describe the assets and give the names of the persons from whom they are to be acquired. State the cost of the assets to the registrant and the principle followed in determining such cost.

## PART II.

## INFORMATION NOT REQUIRED IN PROSPECTUS

### Item 23. Other Expenses of Issuance and Distribution.

Furnish a reasonably itemized statement of all expenses in connection with the issuance and distribution of the securities being registered, other than underwriting discounts and commissions. If any of the securities being registered are to be offered for the account of security holders, indicate the portion of such expenses to be borne by such security holders.

*Instruction*

Insofar as practicable, registration fees, Federal taxes, State taxes and fees, trustees' and transfer agents' fees, cost of printing and engraving, and legal, accounting and engineering fees shall be separately itemized. The information may be given as subject to future contingencies. If the amounts of any items are not known, estimates designated as such shall be given.

LIBRARY
SUPREME COURT, U. S.
IN THE
Supreme Court, U. S.
FILED
OCT 17 1974

# Supreme Court of the United States

October Term, 1974

No. 74-292

EMPIRE FIRE AND MARINE INSURANCE COMPANY, *et al.*,

*Petitioners,*

*against*

DIETRICH MEYERHOFER, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT STUART CHARLES GOLDBERG

ROBERT F. JACOBS
*Attorney for Respondent*
*Stuart Charles Goldberg*
100 Park Avenue
New York, New York 10017
(212) 889-8480

LAWRENCE M. MCKENNA
WORMSER, KIELY, ALESSANDRONI
& MCCANN
100 Park Avenue
New York, New York 10017
*Of Counsel*

IN THE

# Supreme Court of the United States

October Term, 1974

No. 74-292

EMPIRE FIRE AND MARINE INSURANCE COMPANY, *et al.*,

*Petitioners,*

*against*

DIETRICH MEYERHOFER, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT STUART CHARLES GOLDBERG

This brief is respectfully submitted by respondent Stuart Charles Goldberg, intervenor-appellant in the Court of Appeals, in opposition to the petition of Empire Fire and Marine Insurance Company ("Empire") and related individual parties for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review that Court's interlocutory judgment of June 10, 1974,

which, *inter alia*, reversed the District Court's dismissal of the complaint without prejudice and its disqualification of plaintiffs' counsel, but left standing a prohibition against the disclosure by Mr. Goldberg, except on discovery or at trial, of confidential information regarding Empire.

## Question Presented

Was the Court of Appeals correct in finding that respondent Stuart Charles Goldberg had acted as explicitly permitted by DR4-101(C)(4) of the Code of Professional Responsibility in making the limited disclosure he made, in the circumstances in which he had been placed?

## Statement of the Case

Petitioners' statement of facts is, in large measure, another "salvo of innuendo" as the Court of Appeals (Appendix B, p. 21a*) characterized certain of their arguments to the District Court. Rather than restate the facts at length, however, the Court is respectfully referred to the careful summary contained in Judge Moore's opinion below (Appendix B). Its attention is called to the following specific points of record:

---

* As in the petition, references preceded by the word "Appendix" are to the appendices to the petition, while those preceded by the letter "A" are to the appendix filed with the Court of Appeals. Mr. Goldberg's affidavit of January 26, 1973, submitted to the Securities and Exchange Commission and ordered sealed by the District Court, was not reproduced in the appendix below; it is referred to as the "S.E.C. affidavit" in this brief. A second affidavit on the part of Mr. Goldberg, dated June 21, 1973, was submitted to the District Court *in camera*. It was also ordered sealed and did not appear in the appendix; it is referred to as the "June 21, 1973 sealed affidavit" in this brief. By order dated October 10, 1974, the Court of Appeals granted permission to refer to the sealed portions of the record filed with it.

1. Mr. Goldberg made no disclosure to plaintiffs' counsel beyond the contents of the S.E.C. affidavit (A. 94).

2. The only even arguably confidential fact regarding Empire contained in that affidavit was the existence of an undisclosed finder's arrangement between Empire and the Sitomer firm;* no copy of the agreement was annexed to the affidavit.

3. The text of the agreement was made a matter of public record in the District Court when Empire voluntarily made a copy available to underwriter's counsel, who in turn supplied a copy to plaintiffs' counsel (A. 113-114).

## Reasons for Denial of the Writ

While the decision of the Court of Appeals left standing the prohibition against Mr. Goldberg's disclosure, except on discovery or trial, of confidential information concerning Empire (a determination which he does not challenge), at the same time, it clearly indicated that his limited disclosure to plaintiffs' counsel was, in the circumstances, justified by the plain terms of DR4-101(C)(4) of the Code of Professional Responsibility, which states that:

> "A lawyer may reveal * * * [c]onfidences or secrets necessary to * * * defend himself * * * against an accusation of wrongful conduct."

* But see *Colton* v. *United States*, 306 F. 2d 633, 638 (2d Cir. 1962), *cert. denied* 371 U.S. 951, where it was pointed out that the matter of the fees paid by a client to his attorney is "* * * quite separate and apart from the substance of anything that the client may have revealed to the attorney." *A fortiori*, the business arrangement represented by the finder's agreement can hardly be considered confidential matter.

As Judge Moore's opinion makes clear, Mr. Goldberg did nothing more than what the rule explicitly permits.*

It is perfectly obvious that the rule of *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F. 2d 562 (2d Cir. 1973), and similar cases, has no bearing here. Those cases give the interest of a client in the freedom to discuss his affairs openly with his lawyer, which freedom is fostered by the lawyer's obligation to preserve confidences, greater weight than the lawyer's interest in a particular fee. Here, Mr. Goldberg did not seek to represent any interest adverse to Empire and had no interest in any fee. He did, however, as the Court of Appeals properly recognized, have a very substantial interest in his ability to respond to an untrue accusation of knowing participation in a securities fraud in which, in fact, he had taken no part at all, and there is nothing in the Code of Professional Responsibility which required him to stand defenseless in such circumstances, or to prevent him making the very limited disclosure he made.

If, for any reason, this Court feels it appropriate that it should review the propriety of Mr. Goldberg's conduct, he will have no objection. Nevertheless, in view of the plainly correct decision of the Court of Appeals (even the District Court, although its view of the law differed, found that Mr. Goldberg acted "in good faith" [Appendix A, p.

* Petitioners' argument that the rule should be limited to mean something other than what it says is without foundation. The author they themselves quote has pointed out that while the old canons "were not specific in definition of violation", the disciplinary rules contained in the present Code of Professional Responsibility "* * * by their clarity of statement of obligation or prohibition, will afford the adequate notice required by due process." Wise, *Legal Ethics* (2d ed. 1970), pp. 6, 7. If some exception is to be read into DR4-101(C)(4), it can hardly be said that anyone has been put on notice of that fact.

8a]), and the complete absence of conflicting precedent, in the Second or other Circuits, review by this Court of the interlocutory judgment below seems completely unnecessary.

## Conclusion

**It is respectfully submitted that the writ should be denied.**

Respectfully submitted,

ROBERT F. JACOBS
*Attorney for Respondent*
*Stuart Charles Goldberg*

LAWRENCE M. MCKENNA
WORMSER, KIELY, ALESSANDRONI
& MCCANN
100 Park Avenue
New York, New York 10017
*Of Counsel*